Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1966

FREDERICK W. SHOCKLEY, ETC.,
Plaintiffs-Respondents,

versus

COLONIAL PENN INSURANCE COMPANY,
Defendant-Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

WILLIAM G. KELLY, JR.
Davenport, Files, Kelly,
Marsh & Graham
P. O. Box 2977
Monroe, Louisiana 71207

JOSEPH P. CLARK
Attorney at Law
P. O. Box 15767
Philadelphia, Pennsylvania 19103

ATTORNEYS FOR DEFENDANT-PETITIONER

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

No.

FREDERICK W. SHOCKLEY, ETC.,
Plaintiffs-Respondents,

versus

COLONIAL PENN INSURANCE COMPANY,
Defendant-Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner, Colonial Penn Insurance Company, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in this proceeding on April 8, 1980.

OPINIONS BELOW

The opinion of the Court of Appeals has not yet been reported. It is reproduced as Appendix A to this petition. The Judgment, Appendix B, was entered April 8, 1980. Petitioner filed a timely Motion for Rehearing, which was denied. Appendix C.

No opinion of the District Court was published. By a "Memorandum Ruling" entered January 17, 1978, the United States District Judge rendered a decision on the issues as were presented to that Court at that time. This "Memorandum Ruling" is Appendix D.

Upon being informed that a partial settlement had been agreed upon the District Court entered an "Order of Dismissal" February 7, 1978, attached as Appendix E.

By terms of the settlement agreement, the case proceeded to trial solely on the question of whether Colonial Penn Insurance Company insured Ralph M. Sallows at the time of the automobile accident, subject of plaintiff's suit. Upon the finding by the jury that Ralph Sallows had concealed material facts or had made material misrepresentations to Colonial Penn, the "Partial Judgment", attached as Appendix F, was entered February 7, 1978, declaring the policy void.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

The judgment of the Court of Appeals (Appendices A and B) was entered April 8, 1980. A timely petition for rehearing was denied May 2, 1980.

QUESTIONS PRESENTED FOR REVIEW

After it issued a policy of automobile liability insurance, North Dakota form, to Ralph M. Sallows effective November 1, 1975, Colonial Penn discovered concealment and misrepresentation of material facts by Sallows and, by return of premiums and notice on November 26, 1975, sought to rescind the policy. Meanwhile, Sallows was in an auto accident in Louisiana on November 7, 1975, because of which this suit was filed against him and Colonial Penn in that state on November 12, 1975. Colonial Penn was named as a defendant pursuant to the Louisiana Direct Action Statute (La. R.S. 22:655, Appendix I).

The basic question presented is whether the Court of Appeals, in seeking to follow *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 87 L.Ed. 1188 (1938) has, in fact, speculated about prospective holdings of the state court, and in so doing has failed to follow the specific language of the decisions and the statutes applicable, and has failed to properly apply the procedural law and

public policy of the forum state. Specifically included are the questions:

(1) Whether, in speculating upon the application of the North Dakota law derived from a decision of the North Dakota Supreme Court, *Hughes v. State Farm Mutual Automobile Insurance Company*, 236 N.W.2d 870 (1976), the principles there found to require certain specified minimum conditions in auto liability policies can be extended by the Federal Court to render incontestable an auto liability policy once issued notwithstanding that the North Dakota Supreme Court decision limits its application to other stated requirements, and notwithstanding the existence of a statute authorizing recision of a policy after an accident.

(2) Whether, in a "direct action" against an insurer, a Federal Court can apply the law of a foreign state, i.e. North Dakota, and deprive an insurer of a defense specifically reserved to it by the "Direct Action" Statute of the forum state, i.e. Louisiana.

(3) Whether, the limitation of action contained in the law of a foreign state, that a right to rescind a contract of insurance

> may be exercised at any time previous to an action on the contract, should be applied notwithstanding the statute of the forum state which reserves the right to rescind even after a "direct action" against the insurer.

STATUTES WHICH THE CASE INVOLVES

Rules of Decision Act, 28 U.S.C. §1652:

> The laws of the several states, except where the Constitution or Treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

From the North Dakota Century Code, Chapter 26-02 entitled "Contracts of Insurance", the following pertinent sections are set forth as Appendix G:

26-02-13
26-02-14
26-02-15
26-02-22
26-02-23
26-02-24
26-02-25
26-02-29

From the North Dakota "Financial Responsibility Laws", the following pertinent sections are set forth as Appendix H:

39-16-05
39-16.1-11, subsections 1, 2, 3 and 6.

The Louisiana "Direct Action Statute", La. R.S. 22:655, is set forth as Appendix I.

STATEMENT OF THE CASE

For his entire life, Ralph M. Sallows was a citizen and resident of Canada. He was severely crippled and can walk only with the aid of crutches.

Colonial Penn Insurance Company has underwriting principles under which it will not issue a policy of automobile insurance to a resident of Canada nor, except under carefully evaluated conditions, to a person with crippled legs.

By concealing that he was a Canadian resident (he "borrowed" a friend's North Dakota address) and that he was crippled, Sallows obtained an auto policy from Colonial Penn, issued November 1, 1975.

On November 7, 1975, while driving a "Winnebago" motor home, modified by him with special levers to assist in applying the brakes, Sallows was involved in an accident in Louisiana. He "rear ended" an auto that

was slowing ahead of him, glanced off that vehicle, traveled across the highway and collided with the approaching Shockley auto. Mrs. Shockley, wife and mother of the plaintiffs, was killed.

On November 12, 1975, this suit was filed by the husband and children of Mrs. Shockley against Sallows and Colonial Penn in a state court of Louisiana. As the alleged insurer of Sallows, Colonial Penn was joined as a defendant pursuant to the Louisiana Direct Action Statute, La. R.S. 22:655, Appendix I.

Promptly upon discovering the concealment and misrepresentations by Sallows, Colonial Penn tendered return of the premium and notified him that the policy was rescinded.

The plaintiffs were citizens of Louisiana. The defendants were citizens of Canada and of the State of Pennsylvania. There was therefore diversity of citizenship. The suit was removed by the defendants to the District Court of the United States which had original jurisdiction over this civil action. 28 U.S.C. §1441(a).

A compromise was entered into whereby the Shockleys were paid $60,000.00 (of which State Farm, insurer of the third vehicle, contributed $10,000.00). It was further agreed that if Colonial Penn was found to be the insurer of Sallows, then it would pay to the Shockleys an additional $100,000.00. The case was

tried before the jury on the issue of the validity of the policy of Colonial Penn, and pursuant to the jury verdict the policy was adjudged "null and void from its inception."

It was from this verdict that the appeal was taken. The Court of Appeal reversed, finding that the effect of the North Dakota law was to render incontestable a policy of automobile liability insurance once the injury or damage occurs. This result is at variance with the decision of the Supreme Court of North Dakota, *Hughes v. State Farm Mutual Auto Insurance Company*, 236 N.W.2d 870 (1976), and is in conflict with a specific statute that reserves to the insurer the right to rescind a contract of insurance "— at any time previous to the commencement of an action on the contract." North Dakota Century Code, 26-02-29.

In addition, the Court of Appeals found that the above quoted limitation "— such right may be exercised at any time previous to the commencement of an action on the contract." precluded the defense in this case of invalidity of the policy of insurance, because the Louisiana "direct action" was an action on the contract.

By this petition for writ of certiorari, Colonial Penn Insurance Company requests review of the judgment of the Court of Appeals entered April 8, 1980, rehearing denied May 2, 1980.

ARGUMENT FOR WRIT OF CERTIORARI

This being a diversity of citizenship case, state law should be applied. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 87 L.Ed. 1188 (1938) and Rules of Decision Act, 28 U.S.C. §1652. In attempting to apply state law in this case, however, the Court of Appeals has strayed from the path charted by *Erie*. By speculating on what the court of North Dakota might hold, the Court of Appeals has overlooked the limitations of its judgment written by the North Dakota Supreme Court, as well as the specific statutes applicable.

Following a minority view advanced in California and Arizona, in *Hughes v. State Farm Mutual Automobile Insurance Company*, 236 N.W.2d 870 (1976) the Supreme Court of North Dakota held that the "financial responsibility laws" of that state applied, even to the first accident, to require certain essential coverages in an insurance policy if issued to comply with the state's financial responsibility laws.

The error in applying this decision is contained within the opinion of the Court of Appeals:

> "The defense which the company here asserts — misrepresentation in applying for the policy — is different from that held unavailable in *Hughes*. However, the public policy of North Dakota as there enunciated by its Supreme Court, and the broad construction

> placed upon its financial responsibility laws, convinces us that the courts of North Dakota would hold that the company's liability to Sallows under the policy became absolute upon the occurrence of the accident which resulted in the death of Mrs. Shockley, notwithstanding the company's subsequent discovery of Sallows' misrepresentation of a material fact in applying for the policy."

In *Hughes,* the North Dakota court held invalid the "member of the family" exclusion which had prevented the wife, a passenger in the vehicle driven by the husband, from recovering from the insurer when injured because of the negligence of the husband. That exclusion was found incompatible with Subsection 3 of 39-16.1-11, North Dakota Century Code (Appendix H). However, the court went further and enumerated two other essential elements of coverage mandated by the financial responsibility laws, i.e. certain designated minimum limits of liability and an omnibus provision. The opinion states, 236 N.W.2d 870, 883:

> "We deem all three of the above-recited elements essential to the intended operation of our financial responsibility laws, especially Section 39-16-05, N.D.C.C."

That is, by considered dicta, the court went beyond the essential holding and specified those elements of coverage mandated by the statute. Conspicuously ab-

sent is the incontestability provision which the Court of Appeals seeks to add, 39-16.1-11, Subsection 6, N.D.C.C.

If there remained room for speculation or expansive interpretation that might incorporate that incontestability provision into the list of mandated provisions, the possibility is eliminated by the specific language from *Hughes*, 236 N.W.2d 870, 886:

> "*The only portions* of Chapter 39-16.1 incorporated into §39-16-05, and therefore applicable in this case, *are those portions of subsections 1, 2 and 3 of §39-16.1-11 which define the coverage required in a motor vehicle liability insurance policy.*" (emphasis supplied).

The Court of Appeals has fallen into error by speculating as to what the law might be or might become in North Dakota, instead of applying the law as rendered by the North Dakota Supreme Court. Perhaps the Court of Appeals has fallen victim to the problems of speculating on the law of a foreign state. *Lehman Bros. v. Schein*, 416 U.S. 386, 94 S.Ct. 1741, 40 L.Ed.2d 215 (1974).

The observation from *Smith v. Mill Creek Court, Inc.*, 457 F.2d 589 (Ct. of App. 10th Cir. 1972) is appropriate:

> "Although it is possible that such a rule might evolve from the standard, introduced in *Mile*

> *High Fence Co. v. Radovich*, 489 P.2d 308, considered above, federal courts are bound by the present state of th. law in Colorado, as the trial court indicated."

It is submitted that *Yoder v. Nu-Enamel Corp.*, 117 F.2d 488 (Ct. of App. 8th Cir. 1941), is accurate:

> "The responsibility of the federal courts, in matters of local law, is not to formulate the legal mind of the state, but merely to ascertain and apply it."

Had the court in *Hughes* restricted the opinion only to the narrow question of the validity of the "member of the family" exclusion, and not gone beyond that provision, then there might be room for additional interpretation. However, by "considered dicta" the court specified the limits of the requirements of the financial responsibility law and the federal courts are bound by that dicta. *Hawks v. Hamil*, 288 U.S. 52, 53 S.Ct. 240, 77 L.Ed. 610 (1933) and *Nolan v. Transocean Air Lines*, 365 U.S. 293, 81 S.Ct. 555, 5 L.Ed.2d 571 (1961).

As limited by the North Dakota Supreme Court, the *Hughes* decision does not conflict with any statute. As extended by the Court of Appeals in this case, the public policy argument runs afoul of Section 26-02-29, N.D.C.C. (Appendix G):

> "Whenever a right to rescind a contract of insurance is given to the insurer by any provision of this title, such right *may be exercised at any time previous to the commencement of an action on the contract.*" (emphasis supplied).

This statute is in direct contradiction of the speculative interpretation reached by the Court of Appeals. The Court of Appeals is not at liberty to disregard this state statute or to reduce its scope by projecting the *Hughes* decision beyond its application and beyond the limitations to the three essential elements as stated by the North Dakota Supreme Court. The *Erie* doctrine requires that the federal court reconcile the state statute and the jurisprudence. It is error for the Court of Appeals to expand a decision, not otherwise in conflict with the statute, so as to create a conflict.

The laws applicable to motor vehicle liability insurance, and particularly the financial responsibility laws, as relate to contracts of insurance, are of significant interest in governing multiple relationships throughout the United States. Only by reasonable and consistent adherence to the *Erie* principles can a degree of order in this far ranging field of interest be retained. The erroneous venture of the Court of Appeals into an area of speculation causes uncertainties in the application of insurance and in the obligations of the insurers. Reinforcement of the obligation of the federal courts to adhere to the state law, where applicable, is much needed.

Equally in violation of the *Erie* principles is the holding of the Court of Appeals that the "direct action" against Colonial Penn as the insurer was an "action on the contract" and that the effort of Colonial Penn to rescind the policy therefore came too late under the North Dakota law.

It is the law of the forum state that is to be applied. It is a Louisiana procedure, i.e. the "direct action" that is employed to bring Colonial Penn before the Court in advance of a judgment against its insured. It is clearly error for the Court of Appeals to project the public policy of the state of North Dakota, based upon a questionable expansion of a state court decision, and to ignore the public policy of the State of Louisiana set out in that same Direct Action Statute that is used to bring Colonial Penn before the Court (La. R.S. 22:655, Appendix I):

> "It is the intent of this Section that any action brought hereunder *shall be subject to* all of the lawful conditions of the policy or contract and *the defenses which could be urged by the insurer to a direct action brought by the insured*, provided the terms and conditions of such policy or contract are not in violation of the laws of this State." (emphasis supplied).

The Louisiana courts have consistently held, and no contrary decisions have been found, that this provision gives to the insurer the right to raise all de-

fenses in a suit by an injured party (obviously after the accident has occurred) that it would be entitled to raise if the suit were by the insured. *Vest v. Richardson,* 253 So.2d 97 (La. App. 4th Cir. 1971, writ ref., 254 So.2d 618), *Carruth v. State Farm Mutual Automobile Insurance Company,* 113 So.2d 56 (La. App. 2d Cir. 1959, writ denied, 1959), and *McDowell v. National Surety Corporation,* 68 So.2d 189 (La. App. 1st Cir. 1953, writ denied 1954).

Even if it is assumed that the Court of Appeals is correct and that a "direct action" under Louisiana law is an "action on the contract" under North Dakota law, then the limitation expressed in the North Dakota law, to the extent that it conflicts with the above quoted Louisiana statute, would not be applied in the State of Louisiana. *Smith v. Globe Indemnity Company,* 243 So.2d 882 (La. App. 1st Cir. 1971).

The interpretation given 26-02-29, North Dakota Century Code, by the Court of Appeals, places a limitation upon the right of the insurer to rescind a policy, in this instance only eleven days following the issuance of the policy and five days following the occurrence of the accident. This limitation, of course, conflicts with the express reservation in the Louisiana statute that allows the insurer to raise the defense of invalidity of the policy after the "direct action" is brought. In the face of that conflict, the Louisiana court would not apply the limitation of the foreign state. Because he correctly sets out the Louisiana law and the federal principles applicable, we quote from the opin-

ion by Judge Rubin in *Martin v. Texaco, Inc.*, 279 F.Supp. 1015 (E.D. La. 1968):

> "The doctrine of *Erie Railroad Co. v. Tompkins*, 1938, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, tells us that in a diversity action a federal court must apply state law, and *Klaxon Co. v. Stentor Electric Mfg. Co.*, 1941, 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477 tells us that this means state rules of conflict of laws. See also *Wells v. Simonds Abrasive Co.*, 1953, 345 U.S. 514, 73 S.Ct. 856, 97 L.Ed. 1211.
>
> It is a universal principle of American conflict of laws that the statute of limitations of the forum, rather than that of the place where the right in tort arose or where the plaintiff resides, is applicable to all actions. *McCluny v. Silliman*, 1830, 28 U.S. (3 Pet.) 270, 276-277, 7 L.Ed. 676; *Association for Preservation of Freedom of Choice Inc. v. Simon*, 2 Cir., 1962, 299 F.2d 212, 214; *Alropa Corp. v. Rossee*, 5 Cir., 1936, 86 F.2d 118, 119; Restatement, Conflict of Laws §603; Goodrich, Conflict of Laws 152 (1964). This also is the rule in Louisiana. *Newman v. Eldridge*, 1902, 107 La. 315, 31 So. 688; *Roper v. Monroe Grocer Company*, 1930, 171 La. 181, 129 So. 811, 75 A.L.R. 197. And where suit is brought in federal court in Louisiana for a tort allegedly committed in Mississippi, the United States District Court has held the Louisiana statute of

limitations applicable. *Tinsley v. Mills,* E.D. La., 1940, 36 F.Supp. 621. See also *Metropolitan Life Insurance Co. v. Haack,* W.D. La., 1943, 50 F.Supp. 55. This is the view approved by the Court of Appeals for the Fifth Circuit. *Kozan v. Comstock,* 5 Cir., 1959, 270 F.2d 839, 80 A.L.R.2d 310; *Fidelity & Casualty Company of New York v. C/B Mr. Kim,* 5 Cir., 1965, 345 F.2d 45, 50."

Therefore, whether addressed in terms of "procedure" or in terms of "limitations" or whether in terms of "public policy" it is the law of Louisiana, as the forum state, which should be applied. By applying the North Dakota law and thereby limiting the right of the insurer to rescind a contract of insurance obtained through misrepresentation, the Court of Appeals failed to follow the principles of *Erie.*

The consistent application of the *Erie* principles is necessary in the field of liability for automobile accidents, and especially in the application of insurance to protect persons injured as well as persons purchasing the insurance contract. The interplay of financial responsibility laws, insurance contracts, insurance codes, and Direct Action Statutes, is of vital interest throughout the United States. Fragmented, speculative, and inconsistent application of the laws by varying courts should be avoided. The responsibility of the federal courts to adhere to the *Erie* principles in this

vital area should be reinforced. It is respectfully submitted that a writ of certiorari should be granted.

DAVENPORT, FILES, KELLY,
MARSH & GRAHAM
P. O. Box 2977
Monroe, Louisiana 71207
ATTORNEYS FOR COLONIAL PENN
INSURANCE COMPANY

WILLIAM G. KELLY, JR.

JOSEPH P. CLARK
Attorney at Law
P. O. Box 15767
Philadelphia, Pennsylvania 19103
ATTORNEY FOR COLONIAL PENN
INSURANCE COMPANY

CERTIFICATE

I hereby certify that three exact copies of the foregoing Petition for Writ of Certiorari, with Appendices, have this day been mailed, postage prepaid, to Mr. Charles R. Brackin, Voelker, Ragland, Brackin & Crigler, 405 Morgan Street, Lake Providence, Louisiana 71254, Attorneys of Record for the Plaintiffs-Respondents, pursuant to Rule 33(b).

New Orleans, Louisiana, this ____day of June, 1980.

_____

OF COUNSEL

APPENDIX A

Frederick W. SHOCKLEY, etc.,
Plaintiff-Appellant,

v.

Ralph M. SALLOWS, et al.,
Defendants,

Colonial Penn Insurance Company,
Defendant-Appellee.

No. 78-1480.

United States Court of Appeals,
Fifth Circuit.

April 8, 1980.

Appeal from the United States District Court for the Western District of Louisiana.

Before AINSWORTH and HENDERSON, Circuit Judges, and HUNTER,* District Judge.

PER CURIAM:

The appeal in this diversity case concerns the rescission of an automobile liability insurance contract. Mrs.

* District Judge of the Western District of Louisiana, sitting by designation.

Judith Shockley, wife of Frederick Shockley and mother of two minor children, was killed in an automobile accident in Louisiana on November 7, 1975. On November 12, 1975 Shockley, individually and as natural tutor of the minor children, filed a wrongful death action against Ralph Sallows and his insurer, Colonial Penn Insurance Company. The action against the insurer was brought under the Louisiana Direct Action Statute (La.R.S. 22:655). The District Court held that the occurrence of the accident and the filing of the suit by plaintiff did not necessarily preclude the insurer from subsequently rescinding the policy.

The issue of the right to rescind was presented to the jury on an interrogatory: "Did Mr. Sallows conceal a material fact from Colonial Penn?"[1] The jury answered in the affirmative, and on the basis of that response a verdict was entered "that the policy of automobile liability insurance issued to Sallows by Colonial Penn on or about October 28, 1975, was null and void from its inception." Appellant does not attack the trial pro-

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1 The critical question in the application for insurance was: "Do you or any listed driver have a nervous disorder, uncorrected vision defect, crippled or missing limb, fainting spells, or any condition (or take medication) that may affect ability to drive safely? ____Yes ____No." Sallows checked the box beside the "No." Sallows was crippled, having been a victim of polio as a youngster. He had driven for 30 years without an accident. Sallows testified that he answered the question as he did because he did not feel that his crippled limbs affected his ability to drive safely. He further testified that at no time did he intend to deceive Colonial Penn in any manner, or attempt to conceal anything from them. The jury obviously felt otherwise.

cedures, the instructions to the jury, the propriety of the interrogatories, or the sufficiency of the evidence upon which the jury based its verdict. The policy was issued to conform to the requirements of North Dakota. It was delivered to the insured in North Dakota. Both plaintiff and defendants argued that North Dakota law should determine the validity of the contract of insurance, and the district court so held. We agree. *Aetna Casualty & Surety Company v. Evers*, 590 F.2d 600 (5th Cir. 1979).

On this appeal plaintiff relies on two North Dakota statutes to buttress his argument that rescission was expressly prohibited under the facts of this case. These statutes are 39-16.1-11 6(a), North Dakota Century Code, which provides:

> "6. Every motor vehicle liability policy shall be subject to the following provisions which need not be contained therein:
>
> a) *The liability of the insurance carrier with respect to the insurance required* by this chapter shall become absolute whenever injury or damage covered by said motor vehicle liability policy occurs; * * *." (italicizing ours).

Also, 26-02-29, N.D.C.C., which provides:

> Whenever a right to rescind a contract of insurance is given to the insurer by any pro-

vision of this title, such right may be exercised at any time previous to the commencement of an action on the contract.

The District Judge rejected the applicability of each statute and concluded that neither constituted a legal impediment to rescission. From that judgment Shockley appealed. We reverse.

DID THE COMPANY HAVE THE RIGHT TO RESCIND THE POLICY AFTER THE ACCIDENT?

An evaluation of the company's contention that it had the right to rescind *ab initio* after the accident requires consideration of the Financial Responsibility Act of North Dakota, 39-16 and 39-16.1 of the North Dakota Century Code.[2]

---

2 Standing alone, Chapter 39-16 imposes penalties against a motor vehicle owner or operator who is involved in an accident and does not subsequently establish that he is financially capable of responding in damages if he should thereafter be found liable for bodily injury or property damage sustained by any person in such accident. The principal sanctions imposed by §36-16-05, N.D.C.C., however, will not apply, by the very terms of the statute itself, to an owner or operator having in effect an acceptable policy of liability insurance at the time of the person's first accident. Chapter 39-16.1, N.D.C.C., is designed to require a motor vehicle owner or operator who has already had an accident, or who has been convicted of certain traffic offenses, to establish proof of financial ability to respond in damages for any bodily injury or property damage which may occur as the result of *future* accidents. Chapter 39-16.1 sets out specific procedural requirements which an owner or operator must follow in establishing proof of financial responsibility, and also defines, in §39-16.1-11, N.D.C.C., the type of insurance coverage which must be carried by the owner or operator to comply with requirements of Chapter 39-16.1. *See Hughes v. State Farm Mutual Auto. Insurance Co.*, 236 N.W.2d 870, 880 (N.D. 1976).

No useful purpose would be served by a verbatim recitation of these statutes, but a brief explanation is appropriate. The North Dakota financial responsibility laws consist of two chapters. Chapter 39-16, entitled Financial Responsibility of Owners and Operators, is composed of 37 subsections cited in the North Dakota Century Code as 39-16 through 39-16-37. Chapter 39-16.1, entitled Proof of Responsibility for the Future is composed of 11 subsections cited in the Code as 39-16.1 through 39-16.1-11.

Section 39-16.1-11 6(a) provides that the liability of the insurance carrier becomes absolute whenever injury or damage covered by the motor vehicle liability policy occurs. Colonial Penn's position, which was essentially adopted by the District Court, is that the particular policy would be governed by the financial responsibility laws only when such policy was "certified" as such when the "insured" motorist was required to submit proof of financial responsibility.[3] 39-

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3 Defendant accurately cites Louisiana cases (decided prior to 1967) for the proposition that a voluntary automobile liability policy which is not given as proof of financial responsibility is not affected by the provisions of a financial responsibility statute. These cases reflect the Louisiana law which at that time did not require anyone to carry liability insurance of any type in order to operate a vehicle on the highways of the state until after he had first had an accident and thereby been brought within the application of the Act (LSA-R.S. 32:900). In 1977 the Louisiana Legislature enacted a compulsory motor vehicle liability statute and it is certainly questionable whether a policy of automobile liability insurance issued pursuant to that statute can ever be held void *ab initio* after injury covered by the policy occurs. Defendant also cites the North Dakota case of *Farmers Insurance Exchange v. Nagle*, 190 N.W.2d 758, as authority for the proposition that an insurer may

16.1-11 N.D.C.C. The Supreme Court of North Dakota, in *Hughes v. State Farm Mut. Auto. Ins. Co.*, 236 N.W.2d 870 (1976), carefully examined the "financial responsibility laws" in effect at the time of this accident. (Chapters 39-16 and 39-16.1, North Dakota Century Code).[4] The Court stated:

> "The basic purpose for the Legislature's enactment of financial responsibility laws was to protect innocent victims of motor vehicle accidents from financial disaster. * * *
>
> "We are not required, however, to base our conclusion solely on an application of the clear public policy expressed by the Legislature's enactment of the financial responsibility laws. We conclude that our laws are different from statutes commonly found in other jurisdictions, because the provisions dealing with financial responsibility for a driver's first accident (§39-16-05, N.D.C.C.) include as a basic point of reference the definition of a 'motor vehicle liability policy' contained in §39-16.1-11.
>
> * * * * * *

---

rescind for misrepresentation after the occurrence of the accident. This 1971 decision did not involve North Dakota's financial responsibility laws.

4 This authority was not cited in the appellate briefs and we presume was not called to the attention of the district judge.

> "Having in mind such rule, as well as the public policy hereinbefore discussed, we conclude that the 'Conformity Clause' in the insurance policy * * *, although somewhat artfully drawn with an apparent intention to restrict coverage as much as possible, is a sufficient basis on which to hold that such a clause does indeed warrant that the policy in question, whether 'certified' or not, complies with any applicable financial responsibility laws. . . . We further conclude that the certification prerequisite set forth in the Conformity Clause refers only to certification under Chapter 39-16.1, N.D.C.C., and that such certification is not required under Chapter 39-16, N.D.C.C."

It is agreed that the financial responsibility laws are applicable to a policy issued and certified under 39-16.1 We interpret *Hughes* as authority for the proposition that all automobile liability contracts in North Dakota, whether or not "certified," are controlled by the Financial Responsibility Act, provided that the policies purchased voluntarily afford substantially the same coverage as do policies issued in conformity with the mandatory requirements of 39-16.1.

The policy in the instant case afforded substantially the same coverage as do policies issued in conformity with the mandatory requirements of 39-16.1. The policy here was obviously intended to permit the own-

er who was involved in the accident to exempt himself from the provisions of 39-16-05. By its very terms the policy purports to comply with any state "financial responsibility laws," when applicable, although the language of the clause is couched in terms of future financial responsibility, and purports to operate only when certified by the insurance company as proof of financial responsibility. The policy issued by Colonial Penn contains what is commonly referred to as a "Conformity Clause" which warrants to the policyholder that under certain conditions, the policy is in compliance with and conforms to the requirements of the state's financial responsibility laws. The language utilized in the instant policy's "Conformity Clause" is almost identical to that contained in *Hughes,* 236 N.W.2d 870 at 877.

The defense which the company here asserts — misrepresentation in applying for the policy — is different from that held unavailable in *Hughes.* However, the public policy of North Dakota as there enunciated by its Supreme Court, and the broad construction placed upon its financial responsibility laws, convinces us that the courts of North Dakota would hold that the company's liability to Sallows under the policy became absolute upon the occurrence of the accident which resulted in the death of Mrs. Shockley, notwithstanding the company's subsequent discovery of Sallows' misrepresentation of a material fact in applying for the policy. The policy in the instant case is governed by the financial responsibility laws of North Dakota and cannot be voided after the accident occurred.

DID THE DIRECT ACTION SUIT AGAINST THE INSURER CONSTITUTE AN ACTION ON THE INSURANCE CONTRACT?

If the answer to our inquiry is "yes", then the effort to rescind after the commencement of that action is barred under the statute. 26-02-29 N.C. Century Code. The District Court rejected this contention, pointing out that an action on the contract in North Dakota can occur only after the liability of the insured has been fixed by final judgment or compromise. Contrary to this contractual "no action" clause, the Louisiana Direct Action Statute permits injured persons to sue a liability insurer before such final determination. As to injuries occurring in Louisiana, one provision of the statute permits the direct suit on the insurance contract, even though that contract is written in another state and contains a clause forbidding such direct actions. *Watson v. Employers' Liability Assurance Corp.*, 348 U.S. 66, 75 S.Ct. 166, 99 L.Ed. 74 (1955); *Webb v. Zurich Insurance Co.*, 251 La. 558, 588, 205 So.2d 398 (1967); *Talbot v. Allstate Insurance Co.*, 76 So.2d 76 (La. App. 1955). The statute is explicit:

> "* * * The injured person or his or her survivors or heirs hereinabove referred to, at their option, shall have a right of direct action against the insurer within the terms and limits of the policy; and such action may be brought against the insurer alone, or against both the

> insured and insurer jointly and in solido, * * *. *This right of direct action shall exist whether the policy of insurance sued upon was written or delivered in the State of Louisiana or not and whether or not such policy contains a provision forbidding such direct action, provided the accident or injury occurred within the State of Louisiana.*" L.R.S. 22:655 (italicizing ours).

This right of action has been characterized as procedural for some purposes and substantive for others. As to impairment of contract obligations, it is deemed procedural or remedial. *Bouis v. Aetna Casualty & Surety Co.*, 91 F.Supp. 954 (W.D. La. 1950); *Hudson v. Georgia Casualty Co.*, 57 F.2d 757 (W.D. La. 1931). It is substantive in the sense that a federal court in Louisiana will permit direct actions where jurisdiction is based on diversity. *E.G., Lewis v. Manufacturers Casualty Insurance Co.*, 107 F.Supp. 465 (W.D. La. 1952). The action may be brought against the insurer alone or against both the insured and insurer jointly and in solido. The Louisiana Supreme Court has construed this to impose joint and solidary liability on insurer and insured. *See, e.g., Shaw v. New York Tire and Marine Underwriters, Inc.*, 1968, 252 La. 635, 212 So.2d 416; *Fulton v. White Cab Co.*, 305 F.Supp. 1333 (E.D. La. 1969); *Written v. Travelers Indemnity Co.*, 304 So.2d 715 (La. App. 1974).

There are two obligors — the tort feasor and the insurer — liable to the plaintiff for the same damage, at least up to the policy limits. The fact that one is an obligor in tort, and the other as a result of its contract, is of no moment. Both are obligated for the same debt. The

liability of the insurer arises because of its contract. The liability of the insured emanates from his delictual responsibility for his negligent acts. *MidSouth Insurance Company v. Lewis*, 236 F.Supp. 739 (D.C. 1964); *aff'd.* 358 F.2d 887; *Davies v. Consolidated Underwriters*, 1942, 199 La. 459, 6 So.2d 351.

Defendant insists that there was no "privity" between the insurer and the plaintiff. When "privity" was a talismanic word, courts recognized that an enforceable right in a third party beneficiary might be created by statute. That is precisely what the Louisiana Legislature did. The statute, by its terms, is a part of the policy and creates a contractual relationship which inures to the benefit of any and every person who might be negligently injured by the insured as completely as if such injured person had been specifically named in the policy. *Dixon v. Shockley*, La. App., 356 So.2d 96 (1978).

We summarize our holding. The Louisiana Direct Action doctrine encompasses the principle that an injured claimant has standing to sue the insurer on the contract as a third party beneficiary of that contract. *Continental Casualty Company v. Quebedeaux*, 234 F.2d 241 (5th Cir. 1956); *Davies v. Consolidated Underwriters*, 199 La. 459, 6 So.2d 351 (1942). The rights of a third party beneficiary spring from the contract and are determined by contract laws. *See* Restatement of Contracts §§142,

143; Restatement of Contracts 2d §142 (Tent. Draft No. 3, 1967).[5]

The suit against Colonial Penn constituted a suit on its contract, and any effort to rescind that contract after the commencement of the action must necessarily fail. N.D. Cent. Code 26-02-29.

We conclude that Sections 26-12-13 through 26-02-29 of the North Dakota statutes, by their terms, provide for a rescission of a contract of liability automobile insurance. To this rule North Dakota law provides two exceptions. (39-16.1-11 6(a) and 26-02-29). Both exceptions are applicable here. Since the District Court reached a contrary conclusion, its judgment is REVERSED, and judgment should be entered in favor of plaintiff, under the terms of the agreement.

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5 Appellee relies on *Reeves v. Globe Indemnity Co.*, 182 La. 905, 162 So. 724 (1935). There, the Louisiana Supreme Court held that for purposes of appellate jurisdiction, a direct action against a liability insurer was an action for personal injuries and not contractual in nature. The Court reached this conclusion based on a now repealed provision in the 1921 Louisiana Constitution: "It [the Supreme Court] shall have appellate jurisdiction in civil suits * * * except in suits for damages for physical injuries to, or for the death of a person * * *." La.Const. of 1921 Art. 7, §10 (now repealed). This case was decided prior to the amendment of the Direct Action Statute in 1950, which provision declared the right of action exists whether or not the policy sued upon was written or delivered in the State, or whether or not the policy contained a provision precluding direct action, "providing the accident occurred in Louisiana." It was not until 1956 that the Louisiana Legislature added a second amendment relating to the intent and purpose of the section.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 78-1480

FREDERICK W. SHOCKLEY, Etc.,
Plaintiff-Appellant,

versus D.C. No. CA-75-1324

RALPH M. SALLOWS, ET. AL.,
Defendants,

COLONIAL PENN INSURANCE COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the Western District of Louisiana

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Before AINSWORTH and HENDERSON, Circuit Judges, and HUNTER, District Judge.*

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* District Judge of the Western District of Louisiana, sitting by designation.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed with directions in accordance with the opinion of this Court;

It is further ordered that defendant-appellee pay to plaintiff-appellant, the costs on appeal to be taxed by the Clerk of this Court.

April 8, 1980

ISSUED AS MANDATE: MAY 12, 1980

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

(Number and Title Omitted)

ON PETITION FOR REHEARING

(May 2, 1980)

Before AINSWORTH and HENDERSON, Circuit Judges, and HUNTER*, District Court [sic].

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ ROBERT A. AINSWORTH, JR.,
United States Circuit Judge

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* District Judge from the Western District of Louisiana, sitting by designation.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

FREDERICK W. SHOCKLEY et al

versus CA No. 75-1324

RALPH M. SALLOWS, et al

MEMORANDUM RULING

This wrongful death action comes before the Court on the motion of defendant Colonial Penn Insurance Company, Sallows' insurer, for a separate trial on the issue of coverage. Colonial Penn contends that its attempted rescission, shortly after the accident occurred and this suit was filed, is effective because of misrepresentations in Sallows' application for insurance. Before reaching the propriety of separate trials, the Court must examine the suggestion of each side that their own position is correct as a matter of law.

The insurance aspects of the case are governed by the laws of North Dakota, the state of delivery of the policy. *E.g., Metropolitan Life Insurance Company v. Anderson,* 101 F.Supp. 808 (E.D. La. 1951).

Plaintiff cites two statutes for the proposition that Colonial Penn's attempted rescission comes too late. First, N.D. Stat. 26-02-29 states that an insurer may exercise a right of rescission "at any time previous to the commencement of an action on the contract". Plaintiff contends that this action is "an action on the contract". The error in his position is that Colonial Penn is joined in this action only by operation of Louisiana's Direct Action Statute, La. R.S. 22:655, which states in part:

> "It is the intent of this Section that any action brought hereunder shall be subject to all of the lawful conditions of the policy or contract *and the defenses which could be urged by the insurer to a direct action brought by the insured,* provided the terms and conditions of such policy or contract are not in violation of the laws of this state." (Emphasis added.)

As there is no direct action statute in North Dakota, an "action on the contract" in that state can occur only after the liability of the insured has been fixed by judgment or compromise. *See* Policy Condition 7 Part I of the policy attached to the motion for summary judgment; *Milbank Mutual Insurance Co. v. Wentz,* 352 F.2d 592 (8th Cir. 1965). Plaintiff has directed the Court to no Louisiana authority requiring that R.S. 22:655 be given anything other than a literal interpretation. Accordingly, N.D. Stat. 26-02-29 does not render the attempted rescission untimely. This conclusion is reinforced by

the fact that the rescission would not be untimely under Louisiana law. *Vest v. Richardson,* 253 So.2d 97 (La. App. 4th Cir.), *writ denied,* 254 So.2d 618 (La. 1971); *Carruth v. State Farm Mutual Automobile Ins. Co.,* 113 So.2d 56 (La. App. 2d Cir. 1959).

The second statute relied on by plaintiff as rendering the rescission untimely is N.D. Stat. 39-16.1-11. This statute is a verbatim enactment of the uniform law on financial responsibility, which has also been adopted by Louisiana. The statute is expressly limited to liability policies issued as proof of responsibility under the Act. *E.g.,* La. R.S. 32:900 (A). There is no indication that the policy at issue here falls into that category. *See generally Grain Dealers Mutual Insurance Company v. Miller,* 142 So.2d 458 (La. App. 3d Cir. 1962); 2 R. Long, The Law of Liability Insurance §19.11.

North Dakota law provides that false representations such as those alleged here must meet one of two conditions to give rise to a right of rescission. The misrepresentation must either be "made with actual intent to deceive" or have "increased the risk of loss." N.D. Stat. 26-02-25. The test for whether the matter misrepresented increased the risk of loss is whether "it is proved that the hazard insured against would be more likely to happen in the real state of facts than in a state of facts not actually existing, but falsely represented as the real state of facts." *O'Keefe v. Zurich General Accident & Liability Ins. Co.,* 43 F.2d 809 (8th Cir. 1930).

The Court is not able to rule that reasonable minds could not differ as to the intent of Mr. Sallows in making the misrepresentations, nor as to whether the risk of loss was increased. The jury must decide these issues, unless both parties agree to waive the right to jury trial as to coverage.

The motion for a separate trial on the question of coverage is well taken. The misrepresentations, though irrelevant to the question of negligence, would likely be prejudicial to Sallows in the eyes of the jury. Likewise, the existence of liability insurance would be prejudicial to all defendants. Neither of these facts should come before the jury until after liability has been decided. If trial by jury is not waived, then coverage will be decided by the same jury immediately after they return a verdict as to liability. Of course, coverage will be mooted if the verdict should be for defendants.

THUS DONE AND SIGNED in Chambers at Shreveport, Louisiana, this 17th day of January, 1978.

/s/ TOM STAGG
TOM STAGG
UNITED STATES DISTRICT
JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

(Number and Title Omitted)

ORDER OF DISMISSAL

The Court having been advised by counsel for the parties that the above action has been settled,

IT IS ORDERED that this action is hereby dismissed without costs and without prejudice to the right, upon good cause shown within ninety (90) days, to reopen the action if settlement is not consummated.

IT IS FURTHER ORDERED that the parties be directed to submit to the Court a copy of the final settlement agreement as soon as it can be consummated, along with the appropriate order dismissing the case with prejudice.

THUS DONE AND SIGNED at Shreveport, Louisiana, this 7th day of February, 1978.

/s/ TOM STAGG
TOM STAGG
UNITED STATES DISTRICT
JUDGE

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

(Number and Title Omitted)

PARTIAL JUDGMENT

This action having come on for trial before the Court on February 1, 1978, Honorable Tom Stagg, District Judge, presiding, on the issue of coverage of Ralph M. Sallows by Colonial Penn Insurance Company, and the jury having duly rendered its verdict,

IT IS ORDERED that the policy of automobile liability insurance issued to Ralph M. Sallows by Colonial Penn Insurance Company on or about October 28, 1975, is null and void from its inception.

THUS DONE AND SIGNED in Chambers at Shreveport, Louisiana, this 7th day of February, 1978.

/s/ TOM STAGG
TOM STAGG
UNITED STATES DISTRICT
JUDGE

APPENDIX G

Excerpts From
North Dakota Century Code

Chapter 26-02
"Contracts of Insurance"

26-02-01. "Contract of insurance" defined.—Insurance is a contract whereby one undertakes to indemnify another against loss, damage, or liability arising from an unknown or contingent event.

* * * * * * * * * *

26-02-13. Mutual disclosures required in insurance contract.—Each party to a contract of insurance must communicate to the other in good faith all facts within his knowledge which are or which he believes to be material to the contract and which the other has not the means of ascertaining and as to which he makes no warranty.

26-02-14. "Concealment" defined.—A neglect to communicate that which a party knows and ought to communicate is called a concealment.

26-02-15. Rescission for concealment.—A concealment, whether intentional or unintentional, entitles the injured party to rescind a contract of insurance. An intentional and fraudulent omission on the part of one insured to communicate information of

matters proving or tending to prove the falsity of a warranty entitles the insurer to rescind.

* * * * * * * * * *

26-02-22. Representation—Form—When may be made.—A representation may be oral or written. It may be made at the time of issuing the policy or before the policy is issued.

26-02-23. Interpretation of representations regarding insurance.—The language of a representation is to be interpreted by the same rules as the language of contracts in general. A representation as to the future is a promise unless it appears that it was merely a statement of belief or expectation. It cannot qualify an express provision in a contract of insurance, but it may qualify an implied warranty.

26-02-24. False representations—Materiality and effect.—A representation is false when the facts fail to correspond with its assertions or stipulations. If a representation is false in a material point, whether affirmative or promissory, the injured party is entitled to rescind the contract from the time when the representation becomes false, and the materiality of a representation is determined by the same rule which determines the materiality of a concealment.

26-02-25. Misrepresentations—Determination of materiality—Effect.—No oral or written misrepresentations made in the negotiation of a contract or policy

of insurance by the insured or in his behalf shall be deemed material or shall defeat or avoid the policy or prevent its attaching unless such misrepresentation shall have been made with actual intent to deceive or unless the matter misrepresented increased the risk of loss.

* * * * * * * * * *

26-02-29. Modification of contract of insurance—Exercise of right of rescission.—The provisions of this chapter apply to a modification of a contract of insurance as well as to its original formation. Whenever a right to rescind a contract of insurance is given to the insurer by any provision of this title, such right may be exercised at any time previous to the commencement of an action on the contract.

APPENDIX H

North Dakota "Financial Responsibility Laws"

39-16-05

"*39-16-05. Suspension of license and when not applicable.*—The commissioner, within sixty days after the receipt of a report of a motor vehicle accident within this state which has resulted in bodily injury or death, or damage to the property of any one person in excess of one hundred dollars, shall suspend the license of each driver of each vehicle in any manner involved in

such accident, and if such driver is a nonresident, the commissioner shall suspend the driver's privilege of operating a motor vehicle within this state unless such driver shall deposit security as provided in sections 39-16-09 and 39-16-10 in a sum which shall be sufficient in the judgment of the commissioner to satisfy any judgment or judgments for damages resulting from such accident as may be recovered against such driver; provided notice of such suspension shall be sent by the commissioner to such driver not less than ten days prior to the effective date of such suspension and shall state the amount required as security. However, if a driver either resident or nonresident involved in such accident purchases a policy of insurance with at least the amount of coverage required by this section and files proof, and satisfies financial responsibility requirements thereof with the commissioner, that driver shall be allowed to retain his license or privilege until such time as the driver has accepted responsibility for the accident or agreed to a settlement of claims arising from the accident or until a court of this state has determined that the driver was negligent or responsible for the accident in whole or in part. If the driver is found negligent or responsible for the accident, whole or in part, his license or privilege shall be suspended and shall not be returned until the driver complies with the provisions of this chapter. This section shall not apply under the conditions stated in section 39-16-06 or:

"1. To a driver, if he is the owner of the motor vehicle involved in the accident and had

in effect at the time of such accident an automobile liability policy with respect to the motor vehicle involved in such accident, affording substantially the same coverage as is required for proof of financial responsibility under this chapter.

"2. To a driver, if not the owner of such motor vehicle, if there was in effect at the time of such accident an automobile liability policy or bond with respect to his operation of motor vehicle, affording substantially the same coverage as required for proof of financial responsibility under this chapter.

"3. To a driver if the liability of such driver for damages resulting from such accident is, in the judgment of the commissioner, covered by any other form of liability insurance policy or bond or certificate of self-insurance under section 39-16-32.

No such policy or bond shall be effective under this section unless by an insurance carrier or surety company authorized to do business in this state, except that if such motor vehicle was not registered in the state, or was a motor vehicle which was registered elsewhere than in this state at the effective date of the policy or bond, or the most recent renewal thereof, such policy or bond shall not be effective under this section unless the insurance carrier or surety company, if not authorized to do business in this state, shall execute a power of attorney authorizing the commissioner to accept service, on its behalf, of notice or process in any action upon

such policy or bond arising out of such accident; provided, every such policy or bond is subject, if the accident has resulted in bodily injury or death, to a limit, exclusive of interest and costs, of not less than ten thousand dollars because of bodily injury to or death of one person in any one accident, and, subject to said limit for one person, to a limit of not less than twenty thousand dollars because of bodily injury to or death of two or more persons in any one accident, and if the accident has resulted in injury to or destruction of property to a limit of not less than five thousand dollars because of injury to or destruction of property of others in any one accident. Upon receipt of notice of such accident, the insurance carrier or surety company which issued such policy or bond shall furnish for filing with the commissioner a written notice that such policy or bond was in effect at the time of such accident, or the department may rely upon the accuracy of the information and the required report of an accident as to the existence of insurance or a bond unless and until the department has reason to believe that the information is erroneous."

"*39-16.1-11. Motor vehicle liability policy.*—1. A 'motor vehicle liability policy' as said term is used in this chapter shall mean an owner's or an operator's policy of liability insurance, certified as provided in sections 39-16.1-09 and 39-16.1-10 as proof of financial responsibility, and issued, except as otherwise provided in section 39-16.1-10, by an insurance carrier duly authorized to transact business in this state, to or for the benefit of the person named therein as insured.

"2. Such owner's policy of liability insurance:

"a. Shall designate by explicit description or by appropriate reference all motor vehicles with respect to which coverage is thereby to be granted; and

"b. Shall insure the person named therein and any other person, as insured, using such motor vehicle or motor vehicles with the express or implied permission of such named insured, against loss from the liability imposed by law for damages arising out of the ownership, maintenance or use of such motor vehicles within the United States of America or the Dominion of Canada, subject to limits exclusive of interest and costs, with respect to each such motor vehicle, as follows: ten thousand dollars because of bodily injury to or death of one person in any one accident and subject to said limit for one person, twenty thousand dollars because of bodily injury to or death of two or more persons in any one accident, and five thousand dollars because of injury to or destruction of property of others in any one accident.

"3. Such operator's policy of liability insurance shall insure the person named as insured therein against loss from the liability imposed upon him by law for damages arising out of the use by him of any motor vehicle, either unlimited, or limited by excluding cer-

tain classes or types of motor vehicles, within the same territorial limits and subject to the same limits of liability as are set forth above with respect to an owner's policy of liability insurance."

* * *

"6. Every motor vehicle liability policy shall be subject to the following provisions which need not be contained therein:

> "a. The liability of the insurance carrier with respect to the insurance required by this chapter shall become absolute whenever injury or damage covered by said motor vehicle liability policy occurs; * * *."

APPENDIX I

Louisiana "Direct Action Statute"

La. Revised Statutes, Title 22 (Insurance).

Section 655:

§655. Liability policy; insolvency or bankruptcy of insured; direct action against insurer

No policy or contract of liability insurance shall be issued or delivered in this state, unless it contains provisions to the effect that the insolvency or bankruptcy of the insured shall not release the insurer from the payment of damages for injuries sustained or loss occasioned during the existence of the policy, and any judgment which may be rendered against the insured for which the insurer is liable which shall have become executory, shall be deemed prima facie evidence of the insolvency of the insured, and an action may thereafter be maintained within the terms and limits of the policy by the injured person, or his or her survivors mentioned in Revised Civil Code Article 2315, or heirs against the insurer. The injured person or his or her survivors or heirs hereinabove referred to, at their option, shall have a right of direct action against the insurer within the terms and limits of the policy; and such action may be brought against the insurer alone, or

against both the insured and insurer jointly and in solido, in the parish in which the accident or injury occurred or in the parish in which an action could be brought against either the insured or the insurer under the general rules of venue prescribed by Art. 42, Code of Civil Procedure. This right of direct action shall exist whether the policy of insurance sued upon was written or delivered in the State of Louisiana or not and whether or not such policy contains a provision forbidding such direct action, provided the accident or injury occurred within the State of Louisiana. Nothing contained in this Section shall be construed to affect the provisions of the policy or contract if the same are not in violation of the laws of this State. It is the intent of this Section that any action brought hereunder shall be subject to all of the lawful conditions of the policy or contract and the defenses which could be urged by the insurer to a direct action brought by the insured, provided the terms and conditions of such policy or contract are not in violation of the laws of this State.

It is also the intent of this Section that all liability policies within their terms and limits are executed for the benefit of all injured persons, his or her survivors or heirs, to whom the insured is liable; and that it is the purpose of all liability policies to give protection and coverage to all insureds, whether they are named insured or additional insureds under the omnibus clause, for any legal liability said insured may have as or for a tort-feasor within the terms and limits of said policy.